

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

Office - Supreme Court, U.S.

FILED

MAR 8 1983

ALEXANDER L. STEVENS,
CLERK

CONTRA COSTA THEATRE, INC., a corporation,
Petitioner,

vs.

CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,
WILLIAM H. DIXON, RICHARD L. HOLMES, JUNE V. BULMAN,
LAURENCE B. AZEVEDO, RICHARD T. LA POINTE,
FARREL A. STEWART, RICHARD C. STOCKWELL,
PETER H. HIRANO, JAMES MURPHEY, EDWARD H. PHILLIPS,
GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK,
ROBERT T. BARKOFF, LYNNET A. KEIHL, DAVID STEELE,
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,
MILTON D. REDFORD, DAVID A. BROWN,
DELTA BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and
Does I through 100,
Respondents.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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APPENDIX B
(page 1)
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONTRA COSTA THEATRE, INC., a
corporation,

Plaintiff/Appellant,

vs.

CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF
CONCORD, WILLIAM H. DIXON, RICHARD L
HOLMES, JUNE V. BULMAN, LAURENCE B.
AZEVEDO, RICHARD T. LA POINTE, FARREL A.
STEWART, RICHARD C. STOCKWELL, PETER H.
HIRANO, JAMES MURPHEY, EDWARD H.
PHILLIPS, GARY M. CAMPBELL, HAROLD
OSTLING, HARRY L. YORK, ROBERT T.
BARKOFF, LYNNET A. KEIHL, DAVID STEELE,
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,
MILTON D. REDFORD, DAVID A. BROWN, DELTA
BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and DOES
I through 100,

Defendants/Appellees.

No. 81-4070

ORDER

BEFORE: CHOY, PREGERSON and POOLE,
Circuit Judges.

[filed November 29, 1982]

APPENDIX B

(page 2)

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

APPENDIX B
(page 3)

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: November 24, 1982

FROM: Judge Poole

SUBJECT: Contra Costa Theatre, Inc. v.
City of Concord, No. 81-4070

TO: Phillip Winberry, Clerk

I certify that the judges
concerned in the above-entitled case
concur in the attached order. Please
file it.

/s/
Unites States Circuit Judge

CFP/lym
Attach.

cc: Judge Choy, w/attach.
Judge Pregerson, w/attach.

APPENDIX B
(page 4)
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONTRA COSTA THEATRE, INC., a
corporation,

Plaintiff/Appellant,

vs.

CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF
CONCORD, WILLIAM H. DIXON, RICHARD L
HOLMES, JUNE V. BULMAN, LAURENCE B.
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BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and DOES
I through 100,

Defendants/Appellees.

No. 81-4070

DC# C-80-3564-WWS

OPINION

[filed September 8, 1982]

APPENDIX B
(page 5)

BEFORE: CHOY, PREGERSON and POOLE,
Circuit Judges.

PER CURIAM:

On the basis of the district
court's opinion, reported at 511 F.Supp.
87 (N.D.Cal. 1980), the decision of the
district court is **AFFIRMED.**

APPENDIX B
(page 6)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CONTRA COSTA THEATRE, INC.,
a Corporation,

Plaintiff,

v.

CITY OF CONCORD, a municipal
corporation, et al.,

Defendants.

No. C-80-3564-WWS

ORDER

Following the Court's prior order of dismissal with leave to amend, plaintiff has now filed an amended complaint which defendants have moved to dismiss.

Defendants are the City of Concord (City), the City's Redevelopment Agency (Agency), individual members of City Council and Agency, City Manager and Assistant City Manager, certain employees

APPENDIX B
(page 7)

of the City's Planning Department, members of the Planning Commission, and private developers (Developers) (partnership and its individual members).

From 1964 until March 22, 1978, plaintiff Contra Costa Theatres (CCT) possessed a leasehold interest in a 13-acre parcel of land in an older section of Concord. This property was subject to the City's General Plan and Central Area Plan, as well as the Agency's Amended Redevelopment Plan. CCT's use of the property for operation of a single screen drive-in theatre conflicted with all 3 plans. (Defendants' Original Memorandum of P&A, 2:13-16.) A use permit for the drive-in operation had been granted by the City in 1960. On April 16, 1976, CCT filed an application for an amended use permit to expand the scope of its operation to

APPENDIX B
(page 8)

include two or three additional movie screens. (Plaintiff's Amended Complaint, 527) While plaintiff's application was pending, the City Council and Agency publicly adopted the Amended Redevelopment Plan. Discussions between the City and Developers ensued regarding the development of a project on property which included the 13 acres occupied by CCT.

On September 7, 1977, the Planning Commission held a hearing on plaintiff's application for the use permit and denied the application on the ground that it conflicted with the Amended Redevelopment Plan, the General Plan, and the Central Area Plan. Plaintiff did not appeal the denial.

On January 16, 1978, the City Council and Agency passed resolutions condemning plaintiff's property and

APPENDIX B
(page 9)

approving a contract between the Agency and Developers for the sale of plaintiff's property after condemnation.

On March 26, 1978, the City instituted an eminent domain action against plaintiff. Following a jury trial, plaintiff was awarded \$750,000 compensation. The court heard CCT's claim that the City and Agency had conspired to deny its use permit application and depress the market value of its property prior to acquisition. It found that CCT had failed to exhaust its remedies, that the Planning Commission had a rational basis for denial of the application irrespective of redevelopment reasons, and that the Planning Commission had informed CCT of those reasons in its denial. An appeal from that decision is pending in the California Court of Appeal.

APPENDIX B
(page 10)

Plaintiff then instituted this action under 42 U.S.C. § 1983, alleging deprivation of its constitutionally protected right to due process and equal protection. On December 1, 1980, this Court dismissed the complaint on the ground that plaintiff had failed to state a claim cognizable under § 1983. Plaintiff was given leave to amend.

In its amended complaint, plaintiff asserts a right to a use permit subject only to compliance with the applicable standards. The denial of the permit is claimed to be a deprivation of a property right.

To the extent that this action is merely a collateral attack on the Planning Commission's denial based on a contention that plaintiff, having complied with the applicable standards, is entitled to a permit as a matter of

APPENDIX B
(page 11)

law, this Court lacks jurisdiction. That issue is one of state law for consideration by a state court with jurisdiction to review the action of the Planning Commission.

To the extent plaintiff claims a constitutional right to a use permit upon compliance with the requirements of state and local laws and regulations, its claim must be rejected for all of the reasons set forth in the Court's prior order of November 26, 1980.

The Constitution does not create property interests, it only protects them. Plaintiff must look to state law or other independent sources of such interests. Perry v. Sinderman, 408 U.S. 593, 602 (1972). The Planning Commission in this case operates under a municipal code which makes the issuance of a permit discretionary and allows the Commission

APPENDIX B
(page 12)

to consider numerous factors including the general welfare of the City.

Municipal Code § 10833-34. Plaintiff's claim that it had a protectible interest in the issuance of a permit must therefore be rejected. Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980); see also Vruno v. Schwarzwald, 600 F.2d 124 (8th Cir. 1979).

Defendants' motions to dismiss are therefore granted.

IT IS SO ORDERED.

DATED: January 30, 1981.

/s/

WILLIAM W. SCHWARZER
United States District Judge